

KIRBY McINERNEY LLP

June 18, 2015

BY ECF

The Honorable Lorna G. Schofield
United States District Judge
Southern District of New York
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Of counsel

Roger W. Kirby
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Re: *Taylor et al. v. Bank of America Corp. et al.*, No. 15-cv-1350 (LGS),
related to case No. 13-cv-7789 (LGS)

Dear Judge Schofield:

Pursuant to the Court's June 11, 2015 Order (ECF No. 91, No. 15-cv-1350), Plaintiffs Neil Taylor, Steve Leaven and John Burnside (the "*Taylor* Plaintiffs") respectfully move this Court for an order: (1) appointing Kirby McInerney LLP ("KM" or the "Firm") as Interim Lead Counsel pursuant to Fed. R. Civ. P. 23(g)(3); and (2) consolidating all related FX Futures actions in the above-referenced matter (the "FX Futures Action") pursuant to Fed. R. Civ. P. 42(a).

Interim Lead Counsel: KM is qualified and best positioned to steer the FX Futures Actions. When appointing Interim Lead Counsel, Courts generally rely on the factors set forth in Fed. R. Civ. P. 23(g)(1)(A), which include: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." KM meets all of the criteria set forth in Rule 23(g)(1)(A).

Investigation of claims: KM has devoted significant resources to identifying, investigating and prosecuting the claims in this litigation to date. The *Taylor* Plaintiffs' Complaint (ECF No. 1) contains substantial and detailed allegations. The claims alleged reflect extensive analysis, including by the *Taylor* Plaintiffs' retained consulting expert, whose econometric analysis of FX Futures pricing data soundly demonstrates the requisite injury to the *Taylor* Plaintiffs and other Class members. *See, e.g.*, Complaint ¶¶ 100-04. Although the *Taylor* Action and subsequently filed FX Futures Actions are related to the FX Spot Action (*In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789 (LGS)).

Experience and Substantive Knowledge: Since KM's formation over 60 years ago, its primary focus has been on securities, commodities, antitrust and class action litigation. Consequently, KM's experience in complex cases alleging manipulation is vast and all of its 27 attorneys have exceptional experience working on complex litigation matters. The Firm maintains offices in New York and California and has recovered billions of dollars for its clients. The breadth and depth of the Firm's experience strongly supports KM's appointment as Interim Lead Counsel here.

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KM has served as lead counsel in numerous landmark cases of similar magnitude and complexity as this action, and is leading some of the most prominent private antitrust and Commodity Exchange Act (“CEA”) cases currently being prosecuted, including *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262, No. 11-cv-2613 (S.D.N.Y.) (“*LIBOR*”) and *In re North Sea Brent Crude Oil Futures Litig.* No. 13-md-02475 (S.D.N.Y.) (“*Brent*”).¹ The *LIBOR* and *Brent* cases both involve the alleged manipulation of global pricing benchmarks for interest rates and crude oil, respectively.

The attorneys at KM who will primarily lead this FX Futures litigation are senior partners with vast complex litigation experience. David Kovel serves at the helm of KM’s commodities litigation practice and is one of the Firm’s managing partners. Mr. Kovel has significant experience representing both individual and institutional investors and classes of direct purchasers in antitrust matters. Prior to receiving his JD/MBA from Columbia University, Mr. Kovel was a commodities trader for a large financial firm. As a commodities trader, Mr. Kovel took financial risk in futures and options markets and traded physical markets in the U.S., Europe, Asia and Latin America and became a specialist in pricing matters. Mr. Kovel’s experience uniquely qualifies him to prosecute CEA and antitrust claims on behalf of futures traders, like the *Taylor* Plaintiffs and other Class members.

Mr. Kovel is supported at KM by a core team of proven commodities lawyers and trial lawyers (including former prosecutors) who will use their collective expertise to navigate this complex commodities case. Daniel Hume, another of the Firm’s managing partners, focuses on securities, structured finance, and antitrust litigation. Mr. Hume has devoted a substantial portion of his practice to class actions within the financial sector, and he has recovered billions of dollars for corporate consumers, individual consumers, and institutional investors throughout the course of his career. Alice McInerney, prior to joining KM, was Chief of the Investor Protection Bureau and Deputy Chief of the Antitrust Bureau of the New York Attorney General’s office. Andrew McNeela served as Assistant United States Attorney for the Southern District of New York for five years prior to joining KM and represented the United States in a wide array of civil litigation and has substantial trial experience. Lauren Pederson and Thomas Elrod have significant experience litigating antitrust and CEA claims on behalf of futures traders and have developed relevant expertise in prosecuting claims arising from the manipulation of global benchmarks, as alleged in *LIBOR* and *Brent*. Ms. Pederson also has extensive experience in litigating against foreign banks and companies and managing complex discovery.

Resources and Commitment: KM will devote significant time and resources to litigating this case. The anticipated workload will not interfere with the Firm’s commitment in other matters such as *LIBOR*, where Plaintiffs’ CEA claims have survived motions to dismiss and *Brent*, where extensive briefing of over a dozen motions to dismiss has been completed. In the *LIBOR* and *Brent* actions, KM works with and is supported by counsel from other firms that contribute resources for substantial undertakings such as motion to dismiss briefing, document review and discovery. Similarly, here, KM intends to work closely with attorneys from Morris and Morris LLC Counselors at Law and Cafferty Clobes Meriwether & Sprengel LLP (firm

¹ Other relevant examples of KM’s antitrust, CEA and complex litigation experience are reflected on the Firm’s resume, which is attached hereto as Exhibit A. KM’s complete biography is available at www.kmllp.com.

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resumes attached hereto as Exhibits B and C, respectively). These firms have significant experience and successful histories of effectively managing complex CEA and antitrust litigation. For instance, Karen Morris has successfully litigated standard-setting cases like this one. Additionally, Bryan Clobes brings vital experience and knowledge through, among other things, his prior work as trial counsel to the Commodity Futures Trading Commission.

Further, neither the Firm nor the *Taylor* Plaintiffs have any conflicts of interest with the Class. Unlike the other possible lead applicants, including Quinn Emanuel and other Spot Action counsel that have filed new complaints on behalf of FX futures traders, KM has never represented FX Spot clients, and the *Taylor* Plaintiffs did not trade in over-the-counter FX Spot transactions. The *Taylor* Plaintiffs are sophisticated traders who transacted in the relevant FX futures contracts and options on FX futures contracts on U.S. exchanges. Therefore KM and the *Taylor* Plaintiffs are free from any conflicts of interest and are ideally situated to represent FX Futures traders and Class member in this action.

KM has the financial, professional, investigative, and technological resources required to prosecute claims here, and has successfully managed many complex actions like this case. For example, KM vigorously litigated against 40 defendant drug manufacturers as counsel to the State of Iowa, the City of New York, and 42 New York County governments in individual Medicaid fraud cases asserting manipulation of wholesale price data to inflate prices charged to government payers. *See In re Pharm. Industry Average Wholesale Price Litig.*, MDL No. 1456; *The City of New York, et al. v. Abbott Labs., et al.*, No. 01-cv-12257 (D. Mass). KM has recovered over \$225 million for plaintiffs, and, in the process, obtained partial summary judgment against 13 companies for false reporting practices, successfully defended more than 20 motions to dismiss, and resolved claims against all but eight defendants. The Firm is well prepared to devote the same level of expertise and resources here. Accordingly, the *Taylor* Plaintiffs respectfully request that the Court appoint KM as Interim Lead Counsel to represent Plaintiffs in the FX Futures Action. Counsel for the *Teel* Action (No. 15-cv-4436 (LGS)) supports this application by the *Taylor* Plaintiffs to appoint KM as Interim Lead Counsel.

Consolidation and Coordination: For the reasons stated in the associated filings herewith, the *Taylor* Plaintiffs respectfully request that the FX Futures Action be deemed a separate, consolidated action pursuant to Rule 42(a) and be coordinated for discovery and pre-trial purposes with the FX Spot Action and the ERISA Action (*Allen v. Bank of America Corp. et al.*, No. 15-cv-4285 (LGS)).

Respectfully submitted,

/s/ David E. Kovel
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cc: All Counsel of Record (by ECF or Email)

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